

UNITED STATES DISTRICT COURT  
SOUTHERN DISTRICT OF CALIFORNIA

BRENDA VARGAS, *et al.*,  
Plaintiffs,  
v.  
BANK OF AMERICA, N.A.,  
Defendant.

Case No. 12-cv-2247-L(MDD)

**ORDER GRANTING  
DEFENDANT'S MOTION TO  
DISMISS WITH LEAVE TO AMEND  
[DOC. 5]**

On July 18, 2012, Plaintiffs Brenda Vargas and Joel Diaz commenced this action in the San Diego Superior Court against Defendant Bank of America, N.A. ("BANA") for violations of the Rosenthal Fair Debt Collection Practices Act ("Rosenthal Act" or "RFDCPA"), violations of California Business and Professions Code § 17200, and defamation. On September 14, 2012, Defendant removed the action to this Court. Defendant now moves to dismiss the complaint. Plaintiffs oppose.

The Court found this motion suitable for determination on the papers submitted and without oral argument. *See* Civ. L.R. 7.1(d.1). (Doc. 8.) For the following reasons, the Court **GRANTS WITH LEAVE TO AMEND** Defendant's motion to dismiss.

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## 1 I. BACKGROUND

2 On May 4, 2006, Plaintiffs received a loan in the amount of \$76,756.00 from  
3 Countrywide to help purchase a condominium located in Chula Vista, California. (Compl. ¶¶  
4 14–15.) There were two original purchase-money loans for the property because it was an  
5 “80/20” purchase, “that was broken up into the amounts of \$309,096 and \$76,756.” (*Id.* ¶ 16.)  
6 Countrywide Home Loans, Inc. originated both loans. (Def.’s RJN Exs. 1–2.)

7 On May 19, 2009, a notice of default was recorded in the amount of \$8,494.44. (Def.’s  
8 RJN Ex. 3.) On September 20, 2011, the property was sold in a non-judicial foreclosure sale.  
9 (Compl. ¶ 18.) At all times, Plaintiffs used the property as a single-family unit, and the property  
10 was “owner occupied” and never refinanced. (*Id.* ¶ 19.)

11 Since the foreclosure, Plaintiffs allege that “Defendants [sic] has been inaccurately  
12 reporting monthly to the consumer credit reporting agencies a full balance owed which is  
13 inaccurate and has had an extremely detrimental effects [sic] on the Plaintiffs’ credit.” (Compl.  
14 ¶ 22.)

15 On July 18, 2012, Plaintiffs commenced this action in the San Diego Superior Court  
16 against Defendant for violations of the RFDCPA, violations of California Business and  
17 Professions Code § 17200, and defamation. On September 14, 2012, Defendant removed the  
18 action to this Court. Defendant now moves to dismiss the complaint. Plaintiffs oppose.

## 20 II. LEGAL STANDARD

21 The court must dismiss a cause of action for failure to state a claim upon which relief can  
22 be granted. Fed. R. Civ. P. 12(b)(6). A motion to dismiss under Rule 12(b)(6) tests the legal  
23 sufficiency of the complaint. *Navarro v. Block*, 250 F.3d 729, 732 (9th Cir. 2001). The court  
24 must accept all allegations of material fact as true and construe them in light most favorable to  
25 the nonmoving party. *Cedars-Sinai Med. Ctr. v. Nat’l League of Postmasters of U.S.*, 497 F.3d  
26 972, 975 (9th Cir. 2007). Material allegations, even if doubtful in fact, are assumed to be true.  
27 *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 555 (2007). However, the court need not “necessarily  
28 assume the truth of legal conclusions merely because they are cast in the form of factual

allegations.” *Warren v. Fox Family Worldwide, Inc.*, 328 F.3d 1136, 1139 (9th Cir. 2003) (internal quotation marks omitted). In fact, the court does not need to accept any legal conclusions as true. *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009).

“While a complaint attacked by a Rule 12(b)(6) motion to dismiss does not need detailed factual allegations, a plaintiff’s obligation to provide the ‘grounds’ of his ‘entitlement to relief’ requires more than labels and conclusions, and a formulaic recitation of the elements of a cause of action will not do.” *Twombly*, 550 U.S. at 555 (internal citations omitted). Instead, the allegations in the complaint “must be enough to raise a right to relief above the speculative level.” *Id.* “To survive a motion to dismiss, a complaint must contain sufficient factual matter, accepted as true, to ‘state a claim to relief that is plausible on its face.’” *Iqbal*, 129 S. Ct. at 1949 (citing *Twombly*, 550 U.S. at 570). “A claim has facial plausibility when the plaintiff pleads factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged.” *Id.* “The plausibility standard is not akin to a ‘probability requirement,’ but it asks for more than a sheer possibility that a defendant has acted unlawfully.” *Id.* A complaint may be dismissed as a matter of law either for lack of a cognizable legal theory or for insufficient facts under a cognizable theory. *Robertson v. Dean Witter Reynolds, Inc.*, 749 F.2d 530, 534 (9th Cir. 1984).

Generally, courts may not consider material outside the complaint when ruling on a motion to dismiss. *Hal Roach Studios, Inc. v. Richard Feiner & Co.*, 896 F.2d 1542, 1555 n.19 (9th Cir. 1990). However, documents specifically identified in the complaint whose authenticity is not questioned by parties may also be considered. *Fecht v. Price Co.*, 70 F.3d 1078, 1080 n.1 (9th Cir. 1995) (superceded by statutes on other grounds). Moreover, the court may consider the full text of those documents, even when the complaint quotes only selected portions. *Id.* It may also consider material properly subject to judicial notice without converting the motion into one for summary judgment. *Barron v. Reich*, 13 F.3d 1370, 1377 (9th Cir. 1994). Both parties request judicial notice for certain documents. (Docs. 5-2, 6-1.) Neither party opposes. Accordingly, the Court **GRANTS** the parties’ requests.

### 1 III. DISCUSSION

#### 2 A. The Rosenthal Act

3 The Rosenthal Act states that all debt collectors must comply with the Federal Debt  
4 Collection Practices Act (“FDCPA”), 15 U.S.C. §§ 1692b–1692j. Cal. Civ. Code § 1788.17.  
5 “The [FDCPA] prohibits debt collector[s] from making false or misleading representations and  
6 from engaging in various abusive and unfair practices.” *Heintz v. Jenkins*, 514 U.S. 291, 292  
7 (1995). To be liable for an FDCPA violation, a defendant must, as a threshold matter, be a “debt  
8 collector” within the meaning of those acts. *Id.* at 294. The Rosenthal Act incorporates the  
9 substantive provisions of the FDCPA. *See, e.g., Dupuy v. Weltman, Wienberg & Reis Co.*, 442  
10 F. Supp. 2d 822, 825 n.1 (N.D. Cal. 2006); *Edstrom v. All Servs. & Processing*, No. C04-1514,  
11 2005 WL 645920, at \*5 (N.D. Cal. Feb. 22, 2005).

12 Under the FDCPA, a debt collector is “any person who uses any instrumentality of  
13 interstate commerce or the mails in any business the principal purpose of which is the collection  
14 of any debts, or who regularly collects or attempts to collect, directly or indirectly, debts owed or  
15 due or asserted to be owed or due another.” 15 U.S.C. § 1692a(6). This definition includes “any  
16 creditor who, in the process of collecting his own debts, uses any name other than his own which  
17 would indicate that a third person is collecting or attempting to collect such debts.” *Id.* §  
18 1692a(6). The FDCPA does not, however, cover “the consumer’s creditors, a mortgage  
19 servicing company, or any assignee of the debt, so long as the debt was not in default at the time  
20 it was assigned.” *Nool v. HomeQ Servicing*, 653 F. Supp. 2d 1047, 1053 (E.D. Cal. 2009)  
21 (quoting *Perry v. Stewart Title Co.*, 756 F.2d 1197, 1208 (5th Cir. 1985)); *see also* 15 U.S.C. §  
22 1692a(4) (defining “creditor”). Consequently, a loan servicer is not a debt collector if it  
23 acquired the loan before the borrower was in default. *See Schlegel v. Wells Fargo Bank, N.A.*,  
24 799 F. Supp. 2d 1100, 1103-04 (N.D. Cal. 2011).

25 Here, Defendant appears to argue that it is not a debt collector but rather a loan servicer.  
26 (Def.’s Mot. 4:16–5:2.) Plaintiffs respond by arguing that Defendant is a debt collector within  
27 the definition presented in *Pittman v. Barclays Capital Real Estate, Inc.*, No. 09 CV 0241, 2009  
28 WL 1108889 (S.D. Cal. Apr. 24, 2009) (Miller, J.). (Pl.’s Opp’n 5:7–13.) They go on to present

1 a quote purportedly from *Pittman* that defines a debt collector as “‘a person’ the ‘principal  
2 purpose’ of whose business is the collection of debts (whether on behalf of himself or others).”  
3 (*Id.*) However, Plaintiffs’ quote does not appear anywhere in *Pittman*. See *Pittman*, 2009 WL  
4 1108889, at \*3. Without more, Plaintiffs fail to adequately address the threshold issue of  
5 whether Defendant is a debt collector under the Rosenthal Act and FDCPA. See *Heintz*, 514  
6 U.S. at 294.

7 Because Plaintiffs fail to present any reason to find that Defendant is a debt collector, the  
8 Court cannot conclude that Defendant is a debt collector under the Rosenthal Act and FDCPA.  
9 Accordingly, the Court **DISMISSES WITHOUT PREJUDICE** Plaintiffs’ Rosenthal Act cause  
10 of action.

#### 11 12 **B. California Business and Professions Code § 17200**

13 California’s Unfair Competition Law (“UCL”) prohibits “any unlawful, unfair or  
14 fraudulent business act or practice . . . .” Cal. Bus. & Prof. Code § 17200. This cause of action  
15 is generally derivative of some other illegal conduct or fraud committed by a defendant. *Khoury*  
16 *v. Maly’s of Cal., Inc.*, 14 Cal. App. 4th 612, 619 (1993). Plaintiffs allege that Defendant  
17 violated the § 17200 by “violating California Civil Code § 1681s-2 nine times, thereby engaging  
18 in unfair, fraudulent, unlawful business practices.” (Compl. ¶ 33.) Because this cause of action  
19 derives from the Rosenthal Act cause of action that was dismissed above, the Court also  
20 **DISMISSES WITHOUT PREJUDICE** Plaintiffs’ § 17200 cause of action.

#### 21 22 **C. Defamation Per Se**

23 “Defamation is an invasion of the interest in reputation.” *Smith v. Maldonado*, 72 Cal.  
24 App. 4th 637, 645 (1999). “The tort involves the intentional publication of a statement of fact  
25 that is false, unprivileged, and has a natural tendency to injure or which causes special damage.”  
26 *Id.* “Publication means communication to some third person who understands the defamatory  
27 meaning of the statement and its application to the person to whom reference is made.” *Id.*  
28 “Publication need not be to the ‘public’ at large; communication to a single individual is

1 sufficient.” *Id.*

2 California Civil Code § 45a sets forth the elements for defamation *per se*: “A libel which  
3 is defamatory of the plaintiff without the necessity of explanatory matter, such as an inducement,  
4 innuendo or other extrinsic fact, is said to be a libel on its face. Defamatory language not  
5 libelous on its face is not actionable unless the plaintiff alleges and proves that he has suffered  
6 special damage as a proximate result thereof.” Where a plaintiff can prove libel *per se*, damage  
7 to reputation is presumed, so that the plaintiff need not introduce evidence of actual damages to  
8 recover compensatory, or, in appropriate cases, punitive damages. *Barnes-Hind, Inc. v. Superior*  
9 *Court*, 181 Cal. App. 3d 377, 382 (1986).

10 “[California Civil Procedure Code] Section 580b, by its own terms eliminates a creditor’s  
11 ability to seek a deficiency judgment, but *it does not eliminate the underlying debt.*” *Herrera v.*  
12 *LCS Fin. Servs. Corp.*, No. C09-02843, 2009 WL 2912517, at \*8 (N.D. Cal. Sept. 9, 2009)  
13 (emphasis added). “The fact of that debt’s existence may be entirely theoretical, given that  
14 section 580b closes the courthouse door on any creditor’s collection efforts against the  
15 mortgagor. However, the claim that section 580b erases the debt . . . must fail as a matter of  
16 law.” *Id.*

17 Defendant argues that Plaintiffs cannot satisfy the falsity requirement by simply stating  
18 that the credit reporting was “inaccurate.” (Def.’s Mot. 7:8–25.) In response, Plaintiffs argue  
19 that § 580(b) “clearly decrees” that Plaintiffs’ post-foreclosure balance should be zero, and as a  
20 result, “[b]y stating not only a balance due but a past due amount as well, and by reporting this  
21 past due amount and total amount due to the Credit Reporting Agencies,” they adequately allege  
22 that Defendant knowingly published false statements to others. (Pls.’ Opp’n 7:12–24.) Plaintiffs  
23 appear to presume that § 580b erases their debt and, because under their interpretation of § 580b  
24 that they owe nothing to Defendant, reporting a debt to the credit reporting agencies is  
25 tantamount to publishing a false statement. (*See id.*) But Plaintiffs are mistaken.

26 Section 580b does not erase Plaintiffs’ debt. *See Herrera*, 2009 WL 2912517, at \*8.  
27 Rather, it eliminates a creditor’s ability to seek a deficiency judgment. Cal. Civ. Proc. Code §  
28 580b. Thus, without more, § 580b does not serve as a proper basis to support Plaintiffs’

1 defamation cause of action. *See* Cal. Civ. Proc. Code § 580b; *Herrera*, 2009 WL 2912517, at  
2 \*8; *Smith*, 72 Cal. App. 4th at 645. Additionally, § 580b does not prohibit or even discuss  
3 reporting debts to credit reporting agencies. *See* Cal. Civ. Proc. Code § 580b. It is not clear  
4 from Plaintiffs' complaint that Defendant violated § 580b in any way.

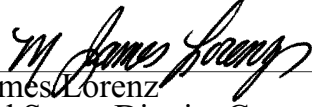
5 Accordingly, the Court **DISMISSES WITHOUT PREJUDICE** Plaintiffs' defamation  
6 *per se* cause of action.

7  
8 **IV. CONCLUSION & ORDER**

9 In light of the foregoing, the Court **GRANTS WITH LEAVE TO AMEND** Defendant's  
10 motion to dismiss, and **DISMISSES** the complaint in its entirety. (Doc. 5.) If Plaintiffs decide  
11 to file an amended complaint, they must do so by **April 22, 2013**.

12 **IT IS SO ORDERED.**

13  
14 DATED: April 2, 2013

15   
16 M. James Lorenz  
United States District Court Judge

17 COPY TO:

18 HON. MITCHELL D. DEMBIN  
UNITED STATES MAGISTRATE JUDGE

19 ALL PARTIES/COUNSEL  
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